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## Prosecutorial Misconduct in Capital Cases in the Commonwealth of Kentucky: A Research Study 1976-2000

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### Repository Citation

Harding, Roberta M. and Thompson, Bankole, "Prosecutorial Misconduct in Capital Cases in the Commonwealth of Kentucky: A Research Study 1976-2000" (2004). *Law Faculty Scholarly Articles*. 562.  
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## Prosecutorial Misconduct in Capital Cases in the Commonwealth of Kentucky: A Research Study 1976-2000

### Notes/Citation Information

Roberta M. Harding & Bankole Thompson, *Prosecutorial Misconduct in Capital Cases in the Commonwealth of Kentucky: A Research Study 1976-2000*, 6 Ky. Just. & Safety Res. Bull. 1 (2004).

Volume 6, Issue 1

APRIL 2004

# KENTUCKY JUSTICE & SAFETY RESEARCH BULLETIN

Justice & Safety Research Center  
*eku*

## A COLLEGE OF JUSTICE AND SAFETY "PROGRAM OF DISTINCTION" RESEARCH GRANT REPORT

### ABSTRACT

The prosecutor wields tremendous power within the American criminal justice system. When that power is misused—particularly in capital cases—tremendous injustices are perpetrated. Yet, occurrences of prosecutorial misconduct seem to occur with distressing regularity.

An exhaustive study covering appeals from 1973-95 revealed that two-thirds of overturned death penalties in the United States resulted from overzealous police and prosecutors who withheld exculpatory evidence. Our study covered 55 Kentucky cases from 1976-2000 and found evidence of prosecutorial misconduct in nearly one-half of them, often with several instances per case.

### PROSECUTORIAL MISCONDUCT IN CAPITAL CASES IN THE COMMONWEALTH OF KENTUCKY:

#### A RESEARCH STUDY

(1976-2000)

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Eastern Kentucky University

## Introduction

It is a travesty of justice and a moral outrage whenever a defendant is convicted of a capital offense due to prosecutorial misconduct. This inevitably leads to an erosion of public confidence in the justice system, hence, the compelling need for constant monitoring of the judicial process and more especially for scholarly investigations of prosecutorial misconduct in death penalty cases, taking into account the paucity of social science and legal research on this issue. Such scholarly responses are also justified on the additional grounds that it is, unquestionably, the professional expectation among lawyers and judges that a prosecutor's preeminent obligation is that of a "minister of justice"<sup>1</sup> which obliges him/her to seek justice for all the parties (a key dimension of which is the vindication of the innocent at all costs) and also to guarantee the defendant's right of due process in capital cases, now elevated to the level of "super due process" by the United States Supreme Court (*Woodson v. North Carolina*).<sup>2</sup> Accordingly, where prosecutorial conduct falls far short of this expectation there arises a compelling need for professional accountability and censure. Despite the admonition of the U.S. Supreme Court that prosecutorial wrongdoing may be grounds for criminal liability as well as disbarment (*Imbler v. Pachtman*)<sup>3</sup>, a study published in the *Chicago Tribune* on January 10, 1999 found that nationwide, since 1963, three hundred and eighty-one (381) homicide cases were

reversed because prosecutors concealed evidence negating guilt and knowingly presented false evidence. Of those 381 defendants, 67 were sentenced to death, and of the 67, nearly half were later released. None of the prosecutors in those cases faced criminal charges or disbarment.<sup>4</sup> To the same effect was a finding from a study done by *Amnesty International* in 1998, which documented numerous capital cases in the state of Texas where prosecutors were guilty of concealing evidence favorable to the defendant from defense attorneys "in contravention of their legal and ethical obligations" under the *Brady* doctrine,<sup>5</sup> and of engaging in improper argument to the capital jurors.

Significantly, judicial decisions in Kentucky dating back to 1931, notably *Jackson v. Commonwealth*<sup>6</sup>, *Goff v. Commonwealth*<sup>7</sup>, *King v. Commonwealth*<sup>8</sup>, and *Stasell v. Commonwealth*<sup>9</sup>, had determined that prosecutors had engaged in improper arguments to capital juries, especially urging them to impose the death penalty in cases because the "community demands it." Recently, the most far-reaching study to date of the death penalty in the United States covering appeals in all capital cases from 1973-1995 conducted by a team of lawyers and criminologists found that 2 out of 3 convictions were overturned on appeal mostly because of serious errors by, amongst others, overzealous police and prosecutors who withheld evidence.<sup>10</sup> Their central findings included the following:

Nationally, during the 23-year study period, *the overall rate of prejudicial error in American capital*

*punishment was 68%, that is to say, the courts found serious, reversible errors in nearly 7 of every 10 of the thousands of capital sentences that were fully reviewed during the period.*

To lead to reversal, error must be serious, indeed.

The most common errors prompting a *majority of reversals* at the state post-conviction stage include mainly *police or prosecutorial misconduct in the form of suppression of evidence favorable to the defendants and essentially of an exculpatory nature.*

High errors put many individuals at risk of wrongful execution: *82% of the people whose capital judgments were overturned by state post-conviction courts due to serious error were found to deserve sentences less than death when the errors were cured at retrial; 7% were found to be innocent of the capital crime.*

These are very revealing disclosures that indicate both the prominence of prosecutorial misconduct in death penalty cases in the United States and its disconcerting frequency.

### Conceptual and Legal Perspectives of the Prosecutorial Function

To appreciate fully the problem of prosecutorial misconduct in the context of capital cases in Kentucky the study addressed the prosecutorial function from these key normative perspectives: international and comparative, definitional, the rule of law, and human rights. In essence,

these perspectives provide the normative baselines against which prosecutorial misconduct was being measured and evaluated. In nearly all major criminal justice systems of the world, the prosecutor plays a critical role.

Commensurate with this role are obligations and responsibilities of considerable implications for the rights and freedoms of individuals who as defendants come under the jurisdiction of the courts. Regardless of which principle (expediency, opportunity, or legality) actually motivates prosecutorial action or decision-making, the role of the prosecutor revolves around the exercise of discretionary powers.<sup>11</sup> Though the exercise of prosecutorial discretion is not unique to the American criminal justice system, nowhere else in the world has the exercise of prosecutorial discretion become a subject of more intense public debate and scholarly criticism in contemporary times than in the United States, the world's leading democracy.

Academics, professionals and lay people have come to acknowledge not only the considerable nature of prosecutorial discretion in almost every phase of the criminal justice process in the U.S.; but also the far-reaching implications of its abuse or wrongful exercise. A major area where these are manifest is that of the prosecution of death penalty cases. Since a capital sentence is the "ultimate punishment," it is from this standpoint that the phenomenon of prosecutorial misconduct can be perceived as having had its most

disturbing impact. Hence, the focus of our study: the prevalence of prosecutorial misconduct during the guilt or penalty phase of capital cases in Kentucky during the period 1976 to 2000.

From a general international legal perspective, the important position that the prosecutor occupies as a principal player in promoting and encouraging respect for human rights and fundamental freedoms can be deduced from the guidelines promulgated in 1990 by the United Nations at its Eighth Congress on the Prevention of Crime and Treatment of Offenders. To underscore its centrality, the prosecutorial function is depicted as a crucial role in the administration of justice. Several provisions explicitly and emphatically reflect the threefold tenet (whether the criminal proceeding is non-capital or one where the defendant has the risk of having "the ultimate penalty" imposed) that it is the obligation of the prosecutor: (a) to act in accordance with the law, fairly, consistently and expeditiously, and to respect, protect and uphold human rights; (b) to refrain from using illegally obtained evidence or evidence of a grossly prejudicial nature against defendants; and (c) to act fairly and impartially throughout both the trial and sentencing phases of a criminal case. In essence, there is international acknowledgement that the supreme obligation of the prosecutor in a criminal case is to convict the guilty and vindicate the innocent. A logical corollary of this international recognition of the prosecutorial function is, in the authors' opinion, that

violations of their ethical duties by prosecutors constitute grave threats to the protection and enforcement of human rights.

In addition to its international recognition, the role of the prosecutor in American and English criminal justice is of considerable preeminence. Historically, the American profile of the prosecutorial role has an ancestral linkage with its British counterpart, hence, their juridical affinity. Admittedly, in the contemporary context of American criminal justice, it is difficult to articulate precisely the nature and scope of the prosecutorial function for two main reasons. First, the prevalence of flexible and often times ambiguous statutory, judicial, and professional guidelines. Second, the role played by pragmatism and expediency in the evolution and development of this very important American institution. This difficulty was alluded to by Steven Phillips, a former assistant district attorney in Bronx County, New York, in his definition of the prosecutorial role as reflecting a tremendous ambivalence—almost a schizophrenia; on the one hand, as a trial advocate, expected to do everything in his power to obtain convictions and on the other hand, as sworn to administer justice dispassionately, to seek humane dispositions rather than to blindly extract every last drop of punishment from every case.<sup>12</sup>

Analogously, in Britain, the prosecutor enjoys tremendous discretionary powers, the exercise of which revolves around the acknowledgement and recognition of

two specific criteria: whether there is sufficient evidence to warrant prosecution (the "realistic prospects of conviction" test) and whether prosecution is deemed to be in the public interest.<sup>13</sup> Even far afield in the Romano-Germanic or civil law system, notably Germany, the Netherlands, France, and Scotland, prosecutors enjoy equally enormous discretionary powers during both the trial and sentencing phases of a criminal case as those of their American and English counterparts.<sup>14</sup>

The study shows that the American profile of the prosecutorial role can be inferred from both the American Bar Association Recommended Prosecution Function Standards (which though never adopted still carry some weight) and isolated judicial pronouncements on the nature and scope of the prosecutor's role in American society. According to the American Bar Association Function Standards, the prosecutor is "an administrator of justice, an advocate, and an officer of the court" whose obligation is to "exercise sound discretion in the performance of his/her functions," whose primary objective is to "seek justice, not merely to convict." This portrayal of the prosecutorial function received the highest and most authoritative judicial endorsement in the landmark case of *Berger v. United States*<sup>15</sup> thus:

*The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially*

*is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a particular and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction, as it is to use every legitimate means to bring about a just one.*<sup>16</sup>

A similar judicial conception of the prosecutorial function was articulated in the case of the *Attorney General v. Tufts*.<sup>17</sup> There, the High Court of Massachusetts described the powers enjoyed by district attorneys in these terms:

*Powers so great impose responsibilities correspondingly grave. They demand character incomparable, reputation unsullied, a high standard of professional ethics, and sound judgement of no mean order... the office is... to be held and administered wholly in the interests of the people at large and with a single eye to their welfare.*

Consistent with the above analysis, it is noteworthy that a not dissimilar portrayal of the Kentucky profile of the Commonwealth Attorney is deducible also from the Kentucky Rules of Professional Conduct. The official portrait is that of a minister of justice and not simply that of an advocate, whose responsibility is to ensure that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Ample judicial support for this conception of the prosecutorial role in the courts of Kentucky dates as far back as the 1920's. One of the earliest decisions was *Bailey v. Commonwealth*<sup>18</sup> where the Court observed that:

*The duty of a prosecuting attorney is not to persecute, but to prosecute, and that he should endeavor to protect the innocent as well as prosecute the guilty, and should always be interested in seeing that the truth and the right shall prevail.*

In *Lickliter v. Commonwealth*<sup>19</sup> it was likewise noted that the prosecuting attorney's duty is to see that justice is done and nothing more. A more modern judicial exposition of the Commonwealth Attorney's role is found in the case of *Niemeyer v. Commonwealth*.<sup>20</sup> There, the Supreme Court of Kentucky characterized the office in these terms:

*One of the finest offices the public can give to a member of the legal profession in this state is that of Commonwealth's Attorney. Its very status becomes a mantle of great power and respect to the wearer. Though few are apt to wear it lightly, some forget, or apparently never learn, to wear it humbly. No one except for the judge himself is under a stricter obligation to see that every defendant receives a fair trial, which means the law as laid down by the duly constituted authorities and not as the prosecuting attorney may think it ought to be.*

The recurring theme underlying the analyses so far of the prosecutorial role is that there are clear ethical obligations attaching to the prosecutorial office. Based on this premise, it can be asserted that grave breaches of prosecutorial ethics are *per se* instances of prosecutorial misconduct, though, admittedly, there are varying degrees of such misconduct.

Accordingly, the authors developed a broad operational definition of the concept of prosecutorial misconduct encompassing serious deviations from the ethical obligations of the prosecutor, and providing some latitude for the concept not to be treated as having a fixed meaning, but as one whose categories are inexhaustive,



varying with the particular facts and circumstances of each case in light of the applicable norms and values regulating prosecutorial conduct and performance. In effect, according to the authors, prosecutorial misconduct should be perceived as a gross violation of a prosecutor's professional obligations and responsibilities including the ethical duties concomitant with the office.

In the context of the research, the contours of prosecutorial improprieties occurring during the guilt and penalty phases covered a wide range of activities including: suppressing evidence; using fake evidence; lying to the jury about defendant's past criminal history<sup>21</sup>; concealing exculpatory evidence and failing to turn over to the defense or the court exculpatory material;<sup>22</sup> making off-the-record comments about uncharged conduct or matters conducted before a grand jury; improper closing arguments<sup>23</sup>; commenting on a defendant's silence; knowingly or intentionally alluding to irrelevant or inadmissible matter, or misleading the jury as to inferences to be drawn from the evidence; and using arguments and introducing evidence calculated to inflame the passions of the jury.<sup>24</sup>

The adverse impact prosecutorial misconduct has on the rule of law and the concept of human rights can be no greater and more repercussive than during the guilt and/or penalty phase of a death penalty case. From the

perspective of the rule of law, due to the tremendous accretion of prosecutorial discretions enjoyed by prosecutors in the U.S. and the lack of well-crafted and effective legislative and judicial safeguards against prosecutorial excesses, it is a grave threat to the rule of law whenever a defendant is convicted of a capital offense, not exclusively on the basis of sufficiency of evidence but due, in part, to prosecutorial misbehavior. A system that accords primacy to human dignity, due process, and equal protection, as does the American constitutional system, cannot be insensitive to threats from within a system evidently designed to protect the value and concept of human rights. Where prosecutorial misconduct becomes, in the familiar legal metaphor, "an unruly horse" it can gravely endanger the concept of human rights thereby depriving the criminal law, in language reminiscent of Blackstone, of its quintessential procedural safeguards to the "trichotomy of life, liberty, and property."<sup>25</sup> "When this happens, the justice process cannot escape censure for being a facilitator or an engine of injustice."<sup>26</sup>

### Research Objectives

The specific issues addressed by the research study were:

1. Whether prosecutorial misconduct has occurred in capital cases in the Commonwealth of Kentucky;

2. If there is evidence of prosecutorial misconduct in this context, then how prevalent is the misconduct;
3. If there is evidence of prosecutorial misconduct in this context, then what are the most prevalent forms of misconduct; and
4. Whether the frequency of prosecutorial misconduct in this context warrants the development and implementation of remedial measures.

## Methodology

In developing the methodology for the study, it was necessary to select the parameters of the time frame for the data. Making this determination required taking into consideration that in 1972 the United States Supreme Court held that the death penalty as administered in the United States violated the Eighth Amendment's proscription against the infliction of cruel and unusual punishment.<sup>27</sup> Subsequently, in 1976 the Court held that the death penalty was not *per se* unconstitutional and approved the new capital sentencing scheme enacted by the Georgia legislature in response to the Court's opinion in *Furman*.<sup>28</sup> On December 22, 1976, the Commonwealth of Kentucky adopted a capital sentencing scheme<sup>29</sup> similar to that approved by the Court in *Gregg*. Consequently, in order for a capital case to be deemed eligible for the study

the death sentence had to be imposed after the activation of Kentucky's newly adopted death penalty legislation. At the other end of the time frame spectrum, the authors decided that in order to qualify the death sentence in a capital case had to have been imposed before June 30, 2000.

After identifying which cases satisfied this eligibility requirement, the authors then had to ascertain which of these cases could progress to the qualifying stage. This required determining which of the eligible cases had, at the minimum, an opinion issued by the Kentucky Supreme Court responding to issues raised by the capital offender's automatic direct appeal from the judgment and sentence entered by the capital trial judge.<sup>30</sup> It was from this pool of qualifying cases that the data for the study was extrapolated.

The judicial opinions of each case that advanced to inclusion in the pool of qualifying cases were then identified, located, and reviewed by the authors. The objective of the reviewing process was to determine whether evidence of prosecutorial misconduct existed in any of the cases. The authors devised three analytical categories to facilitate the evaluation of the cases in the qualifying pool.

The first, and more objective, category focused on whether the offender raised and the judiciary expressly acknowledged the presence of prosecutorial actions that

constituted prosecutorial misconduct that was the sole basis or contributing factor for reversal. The second category encompassed situations where the reviewing court expressly mentioned the issue raised by the condemned person in terms of possibly constituting prosecutorial misconduct, but relied upon other grounds to reverse the case. In the third, and more subjective category while the objected behavior had not been formally labeled prosecutorial misconduct, it, nonetheless could be reasonably inferred that the prosecutor's actions constituted prosecutorial misconduct. For example, under the third category the authors might agree that prosecutorial misconduct existed in substance even though the reviewing court formally analyzed and discussed it under the legal rubric of admissibility of evidence. Furthermore, the authors had to concur on their independent assessment expressly or implicitly on an alleged instance of prosecutorial misconduct before it could conclusively be deemed to be one of prosecutorial misconduct and consequently be subjected to further analysis. At this stage of the evaluative process, the authors determined the aggregate number of instances of prosecutorial misconduct, and the number of capital cases in which such conduct occurred.<sup>31</sup> Due to the subjective attributes of the third category the authors engaged in a vigorous debate about the final designation of the incidents identified in that category. To ensure the

integrity of the study, the authors erred on the side of exclusion rather than inclusion.

After identifying the cases in which prosecutorial misconduct occurred and the individual instances of prosecutorial misconduct, the authors reviewed them again with the objective of assigning them to one of three additional categories developed for the purpose of conducting this study. These three categories were designed to facilitate the completion of the study's analytical facet. The three categories are: evidentiary; prosecutorial statements; and ethics/integrity. Subsequently, to enrich the depth of analysis, subcategories were developed for the evidentiary and prosecutorial statements categories and the relevant instances were assigned to the applicable general and subcategory. The evidentiary subcategories are: visual/audio presentations; victim impact statements; improper strategy; and exculpatory evidence. The prosecutorial statements subcategories are: undermining juror responsibility; statements designed to generate prejudice and passion among the jurors; misstating law or fact; expressing personal opinions; examining witnesses and misstating facts; commenting on the defendant's silence; and statements made during the capital jury *voir dire*. To further the study's integrity, the authors were very careful not to engage in "double-counting" when assigning an instance of prosecutorial misconduct to its appropriate

category. Consequently, an instance of prosecutorial misconduct was assigned to only one category and when applicable to only one subcategory.

## Findings

The authors identified sixty-nine (69) cases in which the death penalty was imposed during the relevant time period. Thus, the pool of eligible cases was composed of sixty-nine (69) cases. This figure includes six (6) cases where three (3) offenders each had two (2) capital trials and death sentences were imposed in each of the six (6) separate trials. The authors determined that fifty-five (55), or 79.9%, of the eligible sixty-nine (69) cases satisfied the criteria for inclusion in the qualifying pool.<sup>32</sup> The authors then found evidence of prosecutorial misconduct in 47.3%, nearly one-half, of these fifty-five (55) qualifying cases.<sup>33</sup>

### 1. Analysis of Data

The authors identified a total of fifty-five (55) separate instances of prosecutorial misconduct in these twenty-six (26) qualifying cases.<sup>34</sup> The largest concentration of instances of prosecutorial misconduct were found in the prosecutorial statement category as thirty-four (34), or 61.82%, of the fifty-five (55) instances were assigned to this general category of misconduct.<sup>35</sup> The next largest group of instances of prosecutorial misconduct, with eighteen (18) recorded instances, were found in the evidentiary category. The fewest instances of

prosecutorial misconduct, with three (3) incidents were recorded in the ethics category.<sup>36</sup>

Accounting for nine (9) of the thirty-four (34) instances of prosecutorial misconduct due to statements made by prosecutors, the authors discovered that the juror responsibility subcategory of the prosecutorial statements category represents a significant problem area in prosecutorial misconduct amounting to a contravention of the constitutional principle announced by the U.S. Supreme Court in *Caldwell*.<sup>37</sup> There, the Court vacated a death sentence because the prosecutor improperly minimized the capital jurors "truly awesome" responsibility in determining the appropriate sentencing that it should not consider itself responsible if it sentenced the defendant to death since the death sentence would be automatically appealed and reviewed for correctness by the Mississippi Supreme Court.<sup>38</sup> Out of the thirty-four (34) eleven (11) were found to involve prosecutorial improprieties like expression of personal opinions (the so-called "golden rule" violation), commenting on the defendant's silence (in violation of the Fifth Amendment privilege against self-incrimination), impropriety during the jury *voire dire*, for example, failure on the part of the prosecutor to disclose jury bias. Evidentiary improprieties prevailed in eighteen (18) cases. They specifically concerned: improper strategies such as visual/audio representations, for example, the introduction of gruesome crime scene and

autopsy photographs, improper use of victim impact statements, and the failure to disclose exculpatory evidence.

Under the ethics/integrity category, the authors referenced only cases where, for example, the reviewing court, as a result of a series of isolated instances of prosecutorial improprieties, characterized the prosecutor's trial tactics as being similar to a "guerilla warfare" culminating in a deprivation of the defendant's right to a fair trial.

### Conclusion

The authors strongly maintain that, on the whole, the findings as reported support the conclusion that for the time period under review prosecutorial misconduct in capital cases in Kentucky was alarmingly prevalent. In summary, the authors strongly contend that their findings point irresistibly to the conclusion that prosecutorial misconduct poses a significant and serious problem in the adjudication of capital cases in Kentucky and requires a remedy.

### Recommendations for Remediating Prosecutorial Misconduct

Having determined that the existence of prosecutorial misconduct in capital cases requires the adoption and implementation of remedial measures, the authors decided that these remedies could best be examined if they were assigned to one of the following

categories: professional remedies; judicial remedies; legislative remedies; and litigation remedies.

In recommending remedies for prosecutorial misconduct it is necessary to describe briefly the capital review process. In *Furman v. Georgia* and in later cases, the U.S. Supreme Court required state high courts to review all death sentences on direct appeal. As a consequence, the law of nearly all states is that capital judgments be automatically appealed.<sup>39</sup> In Kentucky, capital cases are appealed directly from the state circuit court to the Kentucky Supreme Court.

### Professional Remedies

The authors take the view that the problem of combating prosecutorial impropriety by resorting to state bar disciplinary committees is legally one of the effective existing available remedies. Utilizing this remedial tool, however, requires waging the battle on several fronts. First, at the professional level frequent, strict, and effective enforcement of existing disciplinary mechanisms must be invoked. Examples of professional disciplinary tools include the civil discipline of an offending prosecutor by the legal profession and bar associations; the grievance committees imposing disciplinary sanctions against a prosecutor, censure and temporary suspension from practice and permanent debarment.<sup>40</sup> Former Chief Justice Burger wrote: "A bar association conscious of its public obligations would *sua sponte* call to account an attorney

guilty of the misconduct shown here."<sup>41</sup> Unfortunately, bar associations do not frequently invoke their disciplinary powers as a corrective against prosecutorial misconduct.

### Judicial Remedies

Before recommending judicial remedies to the problems posed by prosecutorial misconduct it is helpful to review a critical aspect of the judicial review process in capital cases in order to appreciate how that interacts with the prevalence of prosecutorial misconduct and remedying it. In *Gregg v. Georgia* the United States Supreme Court approved Georgia's new capital sentencing scheme, which included the requirement that the conviction and death sentence in a capital case be automatically appealed to the Georgia Supreme Court, the highest appellate court in that state.<sup>42</sup> Subsequently, nearly all states with the death penalty, including Kentucky, adopted a similar mandatory direct appeal rule.<sup>43</sup>

Reversal of a capital conviction or sentence on direct appeal requires a showing of "serious error." Regrettably, this requirement has led to the frequent application of the judicial doctrine of "harmless error" rendering nugatory explicit and unambiguous findings of grave prosecutorial misconduct. "Harmless error" exists if the wrongful action did not prejudice the offender's conviction or sentence. While a variety of factors can be

relied upon in finding that the error was harmless, probably the most prevalent factor is the strength of the evidence against the defendant's innocence. The stronger the evidence of guilt is, then the more likely that the error will be considered harmless. Consequently, if an error is deemed "harmless," then that error is invalidated as a reason supporting a reversal.<sup>44</sup> The authors contend that the most effective remedy against prosecutorial misconduct is the abolition of the "harmless error" doctrine. Such a doctrine is inconsistent with the principle of fundamental fairness and ought to be abolished if the courts are not to be perceived as "condoning prosecutorial lawlessness and promoting disregard for the law."<sup>45</sup>

Under the harmless error rule appellate courts are authorized to ignore trial errors that were not prejudicial to the defendant's substantive rights. Every jurisdiction has this rule.<sup>46</sup> The application of the "harmless error" doctrine, like the principle of necessity, is tantamount to the exercise of a judicial dispensing power legitimizing prosecutorial impropriety which, by reference to the strict criteria of legality, is manifestly unfair or illegal. It is a result-oriented approach by the appellate courts, which shifts the focus from fairness to guilt. The practical consequences of the adoption of the remedy of abolition would be to render prosecutorial misconduct a *per se* error and thus, depending upon whether the prosecutorial

misconduct occurred during the guilt or penalty phase of the capital trial proceedings, providing grounds for the reversal of the conviction or the death sentence.<sup>47</sup>

Two other judicially-initiated remedies call for greater judicial intervention during the capital trial when the prosecutorial misconduct is occurring.<sup>48</sup> First, trial judges should enhance their vigilance with respect to sustaining defense objections to prosecutorial actions that do or could constitute prosecutorial misconduct.<sup>49</sup> If the capital defense attorney fails to interject an objection, then the trial judge should have the responsibility of independently preventing the prosecutor from engaging in misconduct by objecting *sua sponte* to the proposed or completed activity. If the defense or trial judge has lodged the objection before the jury, and in the case of the defense, the objection has been sustained, then the issuance of a curative instruction is another judicial remedy.<sup>50</sup> The other judicial remedy that has been proposed is for trial judges to promptly issue a “stern rebuke” to the prosecutor and if necessary impose repressive measures,<sup>51</sup> such as holding the prosecutor in contempt of court or declaring a mistrial, in order to punish the prosecutor for employing such tactics and to deter the prosecutor from re-engaging in misconduct during the trial.

### Post-Trial Judicial Remedies

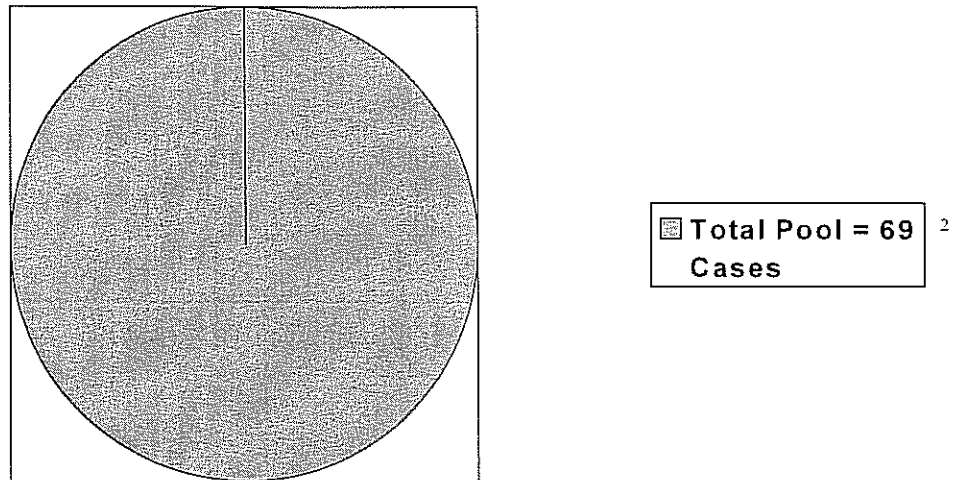
There are several post-trial judicial remedial options. First, for particularly egregious instances of

misconduct and/or for repeated instances of prosecutorial misconduct, the prosecutor’s privilege of prosecuting in that judicial district could be revoked. Another post-trial remedy exists at the appellate level. If the reviewing court in a capital case determines that the prosecutor engaged in misconduct during the proceedings, then in addition to describing the offending behavior, and possibly invoking the *per se* error rule, the Justices should no longer allow transgressing prosecutors to be shielded by a cloak of anonymity. In other words, the offending prosecutor would be personally identified in capital appellate opinions. Furthermore, removing the protection provided by anonymity could be further enhanced if courts adopted a rule prohibiting reviewing courts from designating opinions as “nonpublishable” in cases where prosecutorial misconduct was found.

### Legislative Remedies

Finally, proposed legislative sanctions for prosecutorial misconduct include (a) mandatory removal from office, (b) restructuring of the organization of the prosecution of capital cases so as to diminish the incidence of prosecutorial impropriety, (c) elimination or modification of the doctrine of prosecutorial immunity, and (d) express criminalization of prosecutorial misconduct.

Chart A

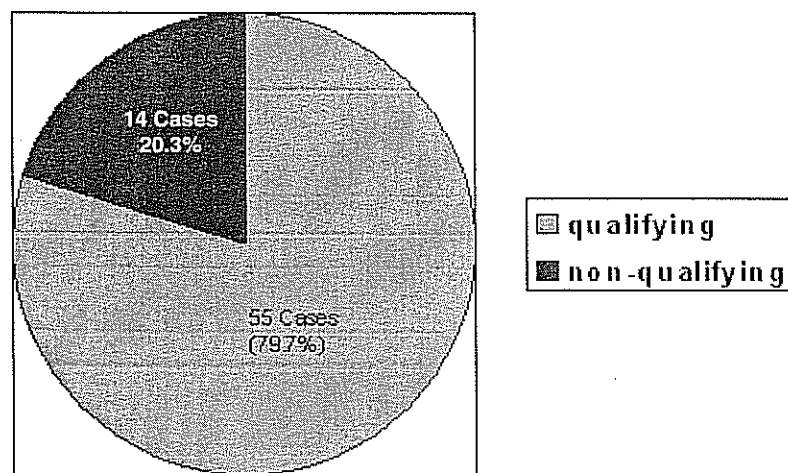
**ELIGIBLE KENTUCKY CAPITAL CASES<sup>1</sup>**

<sup>1</sup>Eligibility was determined in accordance with the following criteria:

- the defendant was charged, convicted, and sentenced to death after December of 1976 (after the Kentucky legislature, pursuant to the US Supreme Court's ruling in *Gregg v. Georgia*, revised the state's death penalty by modeling it after Georgia's, the state whose death penalty legislation the Court had approved in *Gregg* on July 02, 1976); and
- the defendant was charged, convicted, and formally sentenced to death before June 30, 2000.

<sup>2</sup>This figure includes three individuals who each have death sentences received from two separate trials. Thus, the total pool of cases includes these six cases.

Chart B

**TOTAL QUALIFYING POOL<sup>3</sup>**

<sup>3</sup>To be included in this figure the case had to have, at the minimum, an opinion rendered by the Kentucky Supreme Court addressing issues presented in the defendant's automatic direct appeal from the judgment and sentence entered by the state circuit court.



Chart C

### CASES ELIGIBLE FOR PROSECUTORIAL MISCONDUCT ANALYSIS

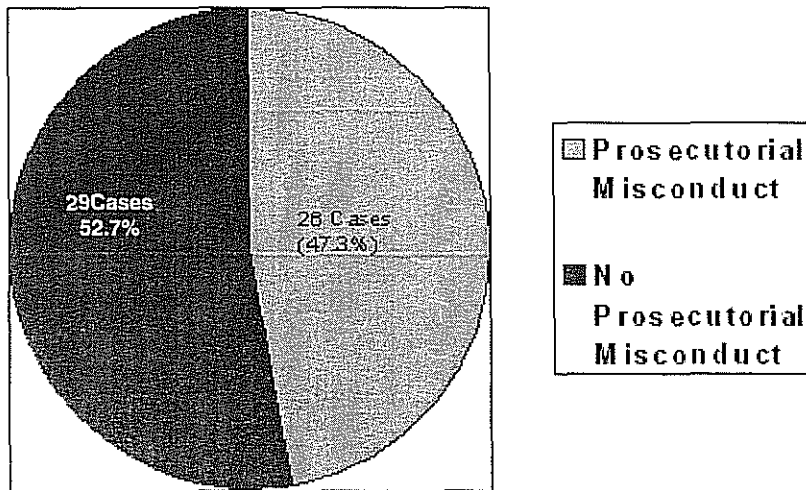
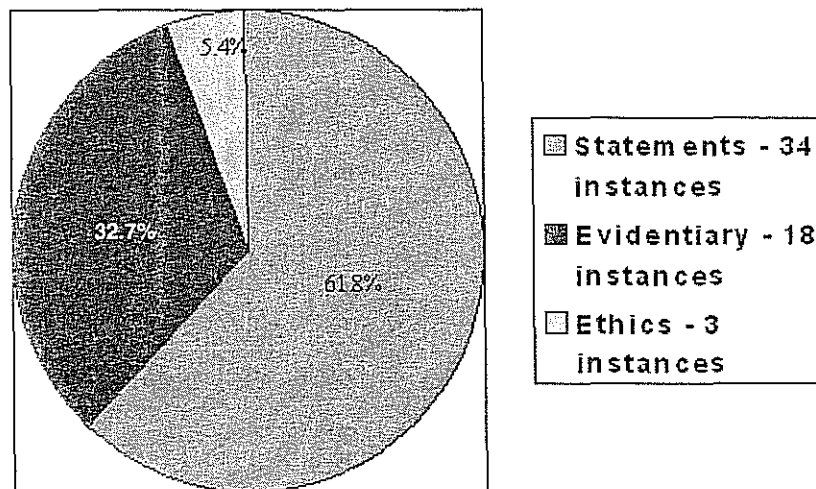


Chart D

### IDENTIFYING THE PROBLEM AREAS



## (Endnotes)

- 1 *Berger v. United States*, 295 U.S. 78 (1935),  
*Brady v. Maryland*, 373 U.S. 83 (1963).
- <sup>2</sup> 428 U.S. 280 (1976).
- <sup>3</sup> 424 U.S. 409 (1976).
- <sup>4</sup> Anderson, John C.  
Prosecutorial Indiscretions.  
(American Lawyer Media, May 5, 1999).
- <sup>5</sup> *Brady v. Maryland*,  
373 U.S. 83 (1963).
- <sup>6</sup> 192 S.W.2d 480 (KY 1946).
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- <sup>30</sup> See K.R.S. section 532.075 (1).
- <sup>31</sup> The authors spent innumerable hours meeting, participating in  
telephone conferences, and exchanging faxes in order to make these  
critical initial designations.
- <sup>32</sup> See Chart B.
- <sup>33</sup> See Chart C.
- <sup>34</sup> See Chart C.
- <sup>35</sup> See Chart D.
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- <sup>42</sup> 428 U.S. 153 (1972).
- <sup>43</sup> KRS 532.075 (1976).
- <sup>44</sup> See a prototypical example of this rule: [a]ny error, defect, irregularity  
or variance which does not affect substantial rights shall be  
disregarded.
- <sup>45</sup> *U.S. v. Antonelli Fireworks Co.*, 155 F. 2d. 631 (2d Cir. 1946)  
(Frank J. dissenting). See *United States v. Modica*  
663 F. 2d. 1173 (2d Cir. 1981). Where the same court expressed its  
"frustrating failure" at the "appearance on its docket of cases in which  
prosecutors have delivered improper summations. Recalling the  
famous dissenting opinion by Justice Frank in *Antonelli Fireworks Co.*,  
the court acknowledged that an attitude of "helpless piety" and the  
use of "purely ceremonial language" encourages prosecutorial  
excesses and breeds a deplorable cynical attitude towards the  
judiciary.
- <sup>46</sup> Federal Rule of Criminal Procedure 52(a) provides a prototypical  
example of this rule: [a]ny error, defect, irregularity or variance which  
does not affect substantial rights shall be disregarded. (See also,  
Gershman 1999: 14).
- <sup>47</sup> Furthermore, automatic reversals could prove to be a powerful  
deterrent to the occurrence of prosecutorial misconduct.  
See *Antonelli Fireworks*, 155 F. 2d at 661-62 (in his dissenting opinion  
Judge Frank notes how the reversal, rather than the affirmance, of  
criminal cases in which instances of prosecutorial misconduct are  
evident can work to deter such actions from happening in the first  
place).
- <sup>48</sup> See *Berger v. United States*, 295 U.S. 78, 84 (1935)  
(noting that it is appropriate for the trial judge to initiate actions  
curbing and remedying prosecutorial misconduct during a non-capital  
criminal trial).
- <sup>49</sup> *Idem.*, at 85.
- <sup>50</sup> *Idem.*, at 85; *Antonelli*: 22, 155 F.2d. at 655, (Frank J. dissenting).
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